SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH MCMAHON **PART** 30M

Justice

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ZACHARY BAGDON, AMANDA BAGDON,

Plaintiff,

- v -

SHEERAZ QURESHI, THE MOUNT SINAI HOSPITAL,

Defendant.

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INDEX NO. 805208/2017

MOTION DATE 09/27/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion for summary judgment pursuant to CPLR 3212 of the defendants Sheeraz Qureshi, M.D. and the Mount Sinai Hospital (hereinafter "defendants") is denied.

This matter arises out of the alleged medical malpractice rendered to the 47-year-old plaintiff, Zachary Bagdon, between April 21, 2016 and July 8, 2016, which left him wheelchair bound and allegedly unable to work[1]. It is undisputed that defendant orthopedic surgeon, Dr. Qureshi, performed two surgical procedures to plaintiff's thoracic spine – the first on May 23, 2016, and the second, a revision surgery to remove and replace a pedicle screw, on May 25, 2016. Plaintiff's pain and bilateral weakness in his legs worsened post-surgery to the point that he had a third fusion procedure, on July 20, 2016, this time with non-party surgeon, Dr. Rush Fisher, who was able to remove the pedicle screw without instrumentation during his attempt to fuse T3 through T12 of plaintiff's spine.

[1] Plaintiff admittedly had a history of back problems, going back to 2011.

BACKGROUND FACTS

On May 23, 2016, Dr. Qureshi performed a posterior costotransversectomy at T7-T8 with access to the disc at T7-8 to excise the disc, and then thoracic laminectomy of T7 and T8 to address central and lateral recess stenosis, followed by posterior thoracic fusion at T7-8 with pedicle screw instrumentation and local autograft bone at T7-T8. Immediately after the surgery, plaintiff complained of extreme right-sided pain with no relief through medication. He was unable to ambulate. One day later, on May 24, 2016, plaintiff complained of severe thoracic back pain radiating to his arms and ribs as well as pain in the right leg and testicle, which was admittedly slightly better than his pre-op baseline. A 7:21 a.m. CT scan revealed "foreign body overlying the left T8 pedicle/traverse process" and noted the "T8 pedicle screw is slightly medially located and transverse the right lateral recess of the spinal cord and there was redemonstration of a foreign body along the posterior aspect of the left transverse process of the T8."

Accordingly, on May 25, 2016, Dr. Qureshi performed a revision insertion of posterior pedicle screw instrumentation T7-T8 followed by re-fusing of the T7-T8 posterior thoracic spine. At his deposition, the doctor testified that he *reduced the size of the screw* and placed the screw at a slightly straighter trajectory. Plaintiff's pain during the month of June 2016 purportedly increased every day.

In July of 2016 plaintiff saw orthopedic surgeon Rush Fisher, M.D. who documented a spinal cord injury, significant progression in symptoms, and weakness that had worsened to the point that plaintiff now needed a walker when he did not need one pre-surgery. Dr. Fisher noted that based on plaintiff's kyphosis (curvature of the upper back), the spine was unlikely to fuse with the one level unilateral fusion and placement of the screw at the apex of the curvature. A July 11,

2016 CT scan confirmed a medial breach from the T8 screw that was transverse into the spinal canal.

EXPERT OPINIONS

In support of the motion defendants attach, *inter alia*, the May 20, 2022 expert affirmation of orthopedic surgeon, Mark Weidenbaum, M.D. (*see* NYSCEF Doc. No.121) who sets forth that: (1) the surgery performed by Dr. Qureshi on May 23, 2016 was indicated based on imaging showing a herniation at T7-8 and plaintiff's corresponding symptoms of thoracic myelopathy for over one year, consisting of groin pain, testicular pain, and lower extremity weakness (*id.*, para 6); (2) Dr. Qureshi's decision to fuse one level on only the right side of the thoracic spine at T7-T8 was appropriate based on the T8 herniation; (3) the doctor's initial use of larger pedicle screws (6.5 mm) to properly support the plaintiff's body weight at that vertebral level was correct (*id*); (4) Dr. Qureshi appropriately made a pilot hole in order to obtain the proper position of the pedicle screws; (5) plaintiff's post-operative complaints of radiating chest pain with inspiration were immediately recognized and addressed, and a CT scan performed on May 24, 2016 showed that the pedicle screw at T7 was positioned in the pedicle of T7 and the pedicle screw at T8 was positioned very slightly medial to the T8 pedicle, with *no contact with the spinal cord*; (6) plaintiff's post operative complaints of back, chest and rib pain were alleviated with pain medications, and would not have been relived with medication if there was a clinically significant spinal cord impingement; (7) Dr. Qureshi's assessment that the plaintiff's post-operative pain was caused by possible physical contact of the pedicle screw head at T8 with the costovertebral articulation of the T8 rib was correct, as was his decision to revise the T8 pedicle screw with a smaller size screw on May 25, 2016 to alleviate the pain;[2] (8) despite the loosening of the T8

[2] Defendants' expert states here that the second pedicle screw "likely lost some purchase in the pedicle and subsequently became loose" and that "another option would have been to place the screws on the left side at that

pedicle screw following the revision surgery on May 25, 2016, neither the original placement of the T8 pedicle screw nor its revision were the proximate cause of the plaintiff's lingering complaints; (10) there is no evidence after the revision that the T8 screw was impinging on the spinal cord, as the screw was pressing only on the dura, confirmed by the June 6, 2016 MRI and the July 11, 2016 CT scan, both of which show the T8 pedicle screw slightly traversing the vacant canal space without impinging on the spinal cord; (11) Dr. Fisher's recommendation to perform fusion from T4-T11 on July 20, 2016 was based upon his own judgment in response to plaintiff's subjective complaints, and was not required by any objective findings at that time; (12) Dr. Fisher confirms that post operatively plaintiff continued to have radicular leg pain and severe pain in his bilateral lower extremities, back and genitals; (13) even if Dr. Fisher was able to remove the pedicle screw without instrumentation during the July 20, 2016 surgery, the screw was contained within the bony confines of the pedicle such that it could not exert any pressure on the spinal cord, and imaging does not support any cord injury or contact of the pedicle screw with the spinal cord in any diagnostic studies; (14) plaintiff's clinical symptoms do not support his claim that a loose pedicle screw caused an injury to his spinal cord during this period of time; (15) imagery through 2018 confirms that there was no mechanical reason for the plaintiff's continuing complaints, and plaintiff's pre-surgical complaints of progressive leg weakness and testicular pain have persisted despite appropriate surgical decompression, fixation and fusion, and (16) there is no evidence in the medical records that the surgeries performed by Dr. Qureshi on May 23, 2016 and May 25, 2016 caused any new or additional injury.

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level, but this was not what the plaintiff was consented for, and was not indicated…malunion, mal-positioning of hardware and failure of hardware are known and accepted risks of this procedure" (*see* NYSCEF Doc. No. 121, para 10).

Dr. Weidenbaum concludes, "within a reasonable degree of medical certainty, that the care provided by defendants herein was appropriate, indicated, and timely and did not deviate or depart from the standards of accepted medical practice…did not cause or exacerbate the plaintiff's alleged injuries" and that "no causal link exists between the surgical procedures performed by Dr. Qureshi and the plaintiff's subsequent physical complaints." (*id.*, para 5).

In opposition to the motion plaintiff submits the redacted report of his expert in orthopedic surgery (*see* NYSCEF Doc. No. 143), who opines "to a reasonable degree of medical certainty" that Dr. Qureshi deviated from the standard of care when he (1) failed to obtain an informed consent by not advising plaintiff of the risks of surgery and by issuing a guarantee[3] that plaintiff's symptoms would not get worse from surgery, and further, that had plaintiff been told of the risk that his symptoms could worsen from surgery, or that he could have additional debilitating neurologic symptoms, he would not have proceeded with the surgery; (2) improperly positioned the T8 screw during the first surgery on May 23, 2016, confirmed by the fact that he had to perform a second surgery to remove the screw; (3) improperly positioned the T8 screw transverse to the right lateral recess of the spinal cord, which was a substantial contributing factor to the pain that plaintiff suffered after the surgery, the need for the May 25, 2016 surgery, and further damage to his spinal cord that manifested itself in the significant deterioration in plaintiff's neurologic function, including his inability to walk without a walker or scooter.

Plaintiff's expert opines that "the standard of care was to perform the May 23rd surgery so that the T7 and T8 were likely to fuse" (*i.e.*, not place screws that will transverse into the spinal canal) and further, that "the fusion surgery would not have been successful if given more time, as asserted by Dr. Qureshi, given the fact that the screws were loose, unstable and improperly placed."

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[3] Dr. Qureshi wrote "the only guarantee we can give is that we will stop the problem from progressing so the sooner you have the problem addressed the better your chances" (*see* EBT of plaintiff, pp. 64, 507-508).

Plaintiff's expert concludes within a reasonable degree of medical certainty, that the untreated spinal cord injury between late May of 2016 and July of 2016 led to more progressive and permanent injuries, and that the improper placement of the screws impacted and caused injury to the spinal cord and caused plaintiff's symptoms to become worse every day during June of 2016. The doctor states unequivocally, that "between the fact that the screws had such poor purchase and the plaintiff's kyphosis, this fusion was not going to work." In his opinion, Dr. Qureshi's failure to timely treat plaintiff was a substantial contributing factor in plaintiff's spinal cord injury and symptoms that progressed and became permanent, known here as "anterior cord syndrome." As for deviation from the standard care and proximate cause, plaintiff's expert sets forth "to a reasonable degree of medical certainty that the screws were improperly placed, impacted, and caused injury to the spinal cord as confirmed by imaging, and that as a result of the failure to timely move and replace the screws, plaintiff's neurological injuries became progressively worse and permanent as established by the fact that his symptoms got worse by the day during June of 2016."

APPLICABLE LAW

The standards for summary judgment are well settled. The proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; [*internal citations omitted*]). The motion must be supported by evidence in admissible form (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]), and the facts must be viewed in the light most favorable to the nonmoving party (*see Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on the issues of credibility" (*Garcia v. J.D. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept.

1992]). evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*Koulermos v. A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept. 2016]).

"The drastic remedy of summary judgment, which deprives a party of his day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*DeParis v. Women's Natl. Republican Club, Inc.*, 148 AD3d 401 [1st Dept. 2017]; [*internal citations omitted*]). "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v. American Lung Assn.*, 90 NY2d 623, 631 [1997]).

To sustain a cause of action for medical malpractice, the plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of the claimed injury. A medical provider moving for summary judgment, therefore, must make a *prima facie* showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept. 2009]; [*internal citations omitted*]), or by establishing that the plaintiff was not injured by such treatment (*see* generally *Stukas v. Streiter*, 83 AD3d 18 [2d Dept. 2011]).

To satisfy the burden on the motion, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and the opinion should specify "in what way" the plaintiff's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v. Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept. 2010]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the *prima facie* showing by the

defendant" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]), but only as to those elements on which the defendant met the burden (*see Gillespie v. New York Hosp. Queens*, 96 AD3d 901 [2d Dept. 2012]). Accordingly, a plaintiff must produce expert testimony regarding the specific acts of malpractice, and not just testimony that alleges "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*Alvarez v. Prospect Hosp.*, 68 NY2d at 325). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to defeat summary judgment (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24). Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v. Long*, 95 AD3d 726, 728-729 [1st Dept. 2012]).

Where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied. "Resolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury" (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 25; *see also Cruz v. St. Barnabas Hospital*, 50 AD3d 382 [1st Dept. 2008]).

ANALYSIS

Through the affirmation of their experts, defendants have established entitlement to summary judgment dismissing plaintiffs' complaint, by submitting, *inter alia*, the factually based and detailed affirmation of Dr. Weidenbaum, who opined that the defendants made all appropriate and timely decisions during treatment of plaintiff between April 21, 2016 and July 8, 2016,

particularly with regard to the Mary 23, 2016 and May 25, 2016 fusion surgeries, and that placement of the pedicle screw was not a proximate result of plaintiff's continuing back injuries.

In opposition plaintiff has met his burden in rebutting defendants' *prima facie* showing by submitting, *inter alia,* the affirmation of his expert, an orthopedic surgeon, who specifically addressed the assertions made by Dr. Weidenbaum. Relevant here is plaintiff's expert's opinion that the placement and purchase of the screws was completely incorrect, given plaintiff's kyphosis and osteopenia, and that these deviations were a substantial contributing factor to plaintiff's spinal cord injury and symptoms that progressed and became permanent.

While evidence of injury alone does not mean that the defendants were negligent (*see Landau v. Rappaport*, 306 AD2d 446 [1st Dept. 2003]), the facts in this record together with plaintiff's expert's opinion as to the departures from good and accepted medical practice mandates a trial on whether defendants' departures were a proximate cause of plaintiff's injuries.

Accordingly, it is

ORDERED that the motion for summary judgment of defendants Sheeraz Qureshi, M.D. and The Mount Sinai Hospital is denied; and it is further

ORDERED that the parties appear for a virtual pre-trial conference by Microsoft Teams on **November 29, 2022 at 11:00 a.m.**

9/29/2022
DATE

JUDITH MCMAHON, J.S.C.
Hon. Judith N. McMahon J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE